No. 20308

(No. 20656 Consolidated)

In the

United States Court of Appeals

For the Ninth Circuit

ANGUS J. DEPINTO and MARGARET F. DEPINTO,
Appellants,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,
Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG,
Appellees.

Reply Brief of Appellants, Angus J. and Margaret F. DePinto, and Intervenor-Appellant, James P. Donohue

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Preface

In the preparation of their Reply Brief, appellees deemed it appropriate to go outside the record and say: "It is equally important to focus attention on the fact that appellants are no longer the real litigants here, but are merely nominal parties who have no stake in the outcome of this litigation or that other pending appeal entitled DePinto and Donahue v. Providence Security Life Insurance Company Dck. No. 20553, 9 Cir. * * * Appellants

are merely bystanders. * * * The foregoing reflects that those who are appealing here in the guise of protectors of the sanctity of marital community property anxious to prevent fraud against a wife are actually commercial general creditors of the bankrupt community who are being led into battle by Massachusetts Mutual Life Insurance Company and the Trustee in Bankruptcy. * * * However, question is raised as to the validity of invoking here the sanctity of the community property when that marital community is hopelessly insolvent and neither member of that community can obtain one dollar of benefit from the decision which the general creditors request in the name of the marital community." In response to appellees, we can only represent to this Court that if, in this action, the judgment against DePinto in *Doig v. DePinto and Provident,* Civ. No. 2974-Phx., is determined not to be a community obligation, there is every reason to believe that (after the major portion of the community obligations have been satisfied from a sale of the real property mortgaged by Trosco Land, Inc.) the community assets will exceed the obligations. The DePintos will, thus, be very substantially benefited by a reversal of the judgment herein. Needless to say, the attorneys for the DePintos herein are, in the prosecution of this appeal, acting, solely and exclusively, for the DePintos.

Argument

1.

RECORD DOES NOT SUPPORT SUMMARY JUDGMENT

(a) The Law.

Appellees have reviewed the cases cited in our Opening Brief for the purpose of attempting to demonstrate that the law in Arizona is something other than the Supreme Court of Arizona has stated. They say that, in Arizona, "the rule is simply that 'community property cannot be reached to satisfy separate *contractual* debts.' " We submit that even a casual reading of the Arizona

cases cited in our Opening Brief will disclose that it is the law, in the State of Arizona, that (a) the community property of husband and wife is not liable for, or subject to, the separate debts or obligations of either spouse; (b) in a tort action there can be no recovery against the community unless the spouse was negligent while furthering a community purpose; and (c) an act done merely as an accommodation to another or because of friendship will not be considered as furthering a community purpose. The case of *Gardner v. Gardner,* 95 Ariz. 202, 388 P.2d 417, so heavily relied upon by appellees, recognizes but one very limited exception to these general rules and which the Court expressed as follows:

> "Essentially, our decision in this case rests on public policy. The obligations of marriage cannot be thrown aside like an old coat when a more attractive style comes along. An alimony debt from a previous marriage can be satisfied out of the community property."

Obviously, an alimony debt from a previous marriage has no conceivable relationship to a tort obligation incurred during marriage.

Appellees argue that, in Texas and California, community property is liable for the torts of the husband, whether committed while serving a community purpose or not. They point out that in *Mortenson v. Knight,* 81 Ariz. 325, 305 P.2d 463, the Supreme Court of Arizona said:

> "From the foregoing we are compelled to conclude that the decisions of the State of Washington, while informative, are not necessarily more persuasive than either of those of the States of California or Texas."

The Court went on to hold that the family car doctrine applies to a community-owned automobile. Not even the most adroit legal gymnastics can twist the opinion of the Court into a substitution of the laws of California and Texas for the settled law of Arizona.

(b) The Facts.

We concede that there can be little dispute about the evidentiary facts in this case. When DePinto served on the Board of Directors of United, he had no direct or indirect financial interest in the company. He served on the Board of United purely as a matter of friendship for Kelly; he thought he "needed a helping hand". There is nothing whatsoever in the record to contradict the testimony of the DePintos and the affidavits of DePinto, Lentz and Roca. On this state of the record, the lower court would have been justified in granting a summary judgment for appellants. The effect of what the lower court did was to decide, as a matter of law, that where a husband serves as a member of the Board of Directors of a corporation, he is *ipso facto* furthering a community purpose. In the case of *Cameron v. Vancouver Plywood Corp.,* 266 F.2d 535 (9th Cir. 1959), this Court stated:

> "In deciding whether there is a genuine issue as to any material fact, the circumstance that a particular pleading deposition, admission, or affidavit is taken as true is not determinative. An issue of fact may arise from the countering inferences which are permissible from evidence accepted as true. As stated in Slocum v. New York Life Insurance Co., 228 U.S. 364, 388-389, 33 S.Ct. 523, 533, 57 L.Ed. 879, '* * * the admission [of facts on demurrer] * * * must be of the facts, and not merely the evidence from which their existence is inferable. * * *' See, also, Guerrero v. American Hawaiian Steamship Co., 9 Cir., 222 F.2d 238, 243.
>
> "All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment. Toebelman v. Missouri-Kansas Pipe Line Co., 3 Cir., 130 F.2d 1016."

And, in *Consolidated Electric Co. v. United States,* 355 F.2d 437 (9th Cir. 1966), this Court said:

> "If, viewing the evidence as a whole and the inferences which may be drawn therefrom in the light most favorable to the party opposing the motion, we can see that there is no

genuine issue of fact, then the granting of a motion for summary judgment should be sustained. United States ex rel. Austin v. Western Elec. Co., 337 F.2d 568, 575 (9th Cir. 1964); see generally Wright, Federal Courts § 99 (1963)."

It is obvious that in drawing inferences from the evidence as a whole, the trial court ignored the rule that he must do so "in the light most favorable to the party opposing the Motion". In the face of the diametrically opposed evidence, the trial court concluded that DePinto's service on the Board of United was in furtherance of a community purpose because (a) such service would increase the status or prestige of the DePintos; (b) such service would result in the advertising of DePinto's practice as an obstetrician; and (c) such service would "foster" friendship between the Kellys and the DePintos. This Court can take judicial notice that serving on the Board of Directors of the Ford Foundation, Stanford University or American Telephone & Telegraph Company might, in the eyes of some people, be considered a status symbol. But, to equate one of those institutions with United Security Life, is to abandon reality and common sense.

To infer that DePinto secured "advertising" for his medical practice by serving on the Board of United, is to completely ignore the record. DePinto had a flourishing medical practice and had no need for "advertising". Furthermore, there is no evidence whatsoever that his association with United resulted in any member of the public becoming aware that DePinto was a practicing obstetrician.

It cannot be denied that DePinto served on the Board of United as a matter of friendship to Kelly. But, as we have seen, an act prompted by friendship, or even close family relationship, will not thereby be deemed to be in furtherance of a community purpose.

In the case of *Mortenson v. Knight, supra,* the Supreme Court of Arizona explains that the marital community is not an entity

for which the husband acts as agent. The Court said: "It is true that the law does consider it expedient and necessary in business transactions affecting the community personalty that there be a person with the power to act. The husband may be loosely designated as the agent of the wife in the management and disposition of her interest, yet the analogy is quite obviously misleading when applied to the relationship of the husband to his half interest. * * * Moreover, settled judicial construction in this state recognizes the husband's dominance in the management and control of the common property."

This Court will appreciate that in serving upon the Board of United, DePinto did not purport to exercise any control over "the common property". As the agent of the wife in the management of her interest in the community, was DePinto acting within the scope of such "agency" when he engaged in an activity which could not have been of any benefit to such interest and which exposed such interest to a possible liability of hundreds of thousands of dollars? If the DePinto community assets can be wiped out by the improvident and gratuitous acts of the husband, then the wife is completely at the mercy of her "agent". Fortunately, that is not the law in Arizona.

2.

PRELIMINARY INJUNCTION

In opposing our argument that the trial court erred in failing to grant a preliminary injunction, appellees do not challenge our contention that appellants would suffer irreparable injury if the injunction were denied. Rather, they say that the denial of a preliminary injunction is within the discretion of the trial court and that we have not charged the trial court with abuse of discretion. We suggest that when we specified error on the part of the trial court in failing to grant a preliminary injunction, there was implicit therein the charge that such failure constituted an abuse of

discretion. If, as we contend, the evidence supported the conclusion that appellants were entitled to a permanent injunction and that irreparable injury would result from delay in granting such injunction, it would seem obvious that the trial court abused its discretion in failing to grant a preliminary injunction.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. JENCKES, JR.

Joseph S. Jenckes, Jr.